

## Koch, Kristine

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**From:** Yamamoto, Deb  
**Sent:** Monday, July 07, 2014 1:29 PM  
**To:** PARRETT Kevin; JOHNSON Keith  
**Cc:** Koch, Kristine; Cora, Lori; GAINER Tom; Grandinetti, Cami; Cohen, Lori  
**Subject:** Latest draft of the Portland Harbor Superfund Site ARARs  
**Attachments:** Copy of Table 2 2-4\_ARARs\_2014-07-01 (2).xlsx

Kevin and Keith,

Attached is the latest table containing the draft ARARs for the Portland Harbor Superfund site Feasibility Study. As we have discussed, the current draft ARAR table has deleted the State's hot spot regulations. In addition, there are no TBCs in this draft document. Please note that the Excel file contains several tabs. The first is the old ARAR table, then three tabs with updated proposed chemical specific, action specific and location specific ARARs.

One State ARAR that is still being analyzed for eligibility are the DSL fill and removal compensatory mitigation regulations listed on the attached draft ARAR table. We are currently consulting with wetlands experts regarding whether these regulations are more stringent than what is required by Section 404 and the 404(b)(1) guidelines. If we decide they are not more stringent, they will be deleted from the table. If you or DSL wish to provide your basis for why they are, we would appreciate your input. **Based on the schedule for development of Section 2 of the FS, we'd appreciated hearing any concerns or input on this draft table within the next two weeks. After Section 2 has been sent out for review, DEQ will also have another opportunity to comment at that time.**

Also, as you requested, below is the basis for EPA's decision that the hot spot regulations do not meet the eligibility criteria for State ARARs provided for in the NCP.

CERCLA §121(d)(2)(A) limits the scope of State ARARs to standards, requirements, criteria, or limitations under environmental or facility siting laws that are promulgated and more stringent than Federal requirements. 40 CFR 300.400(g)(4) further provides that: "Only those state standards that are promulgated, are identified by the state in a timely manner, and are more stringent than federal requirements may be applicable or relevant and appropriate. ARARs are defined as substantive levels of cleanup or standards of control, therefore, they do not include administrative requirements of state law or regulations.

ORS 415.315 and the hot spot implementing regulations are promulgated and are legally enforceable under Oregon state law. The two questions EPA analyzed regarding the hot spot regulations were: Is the Oregon statutory and regulatory requirement to treat hot spot contamination, if feasible, a substantive cleanup requirement and, if it is, is it more stringent than federal law?

OAR 340-122-0115(35) provides media-specific criteria for identifying hot spots, which are substantive criteria. However, the legal mandate to select a remedy that treats hot spots and/or requires they be excavated for off-site disposal is subject to the discretionary analysis described in Oregon's feasibility study regulations and remedy selection factors found in OAR 340-122-0085 and 0090. Those Oregon regulations provide how feasibility studies are to be conducted. The feasibility process is an administrative process only applicable to cleanups undertaken under Oregon hazardous substances cleanups. CERCLA and more specifically the NCP provide for the remedial investigation and feasibility study process under CERCLA. The application of other laws to CERCLA remedies does not replace or modify the CERCLA feasibility process. Because treatment of media-specific hot spots identified under Oregon law is only required after a feasibility study determines doing so is feasible, it is arguable that the hot spot regulations are not a substantive requirement for cleanup as defined by CERCLA.

Assuming Oregon's hot spot regulations were found to establish a substantive cleanup standard, they would need to also be more stringent than federal law to be ARAR. "State requirements that are clearly less restrictive than Federal

counterparts are not ARARs. State requirements that are equivalent to but not more stringent than Federal requirements are those that are: (1) identical to Federal requirements, i.e., enacted verbatim; or (2) not identical to Federal requirements but are substantively equivalent, i.e., that use the same or a different approach to achieve an identical result. In such situations, by complying with the Federal ARAR, the State requirement will have been adequately considered.” *CERCLA Compliance with other Laws Manual: Part II, Clean Air Act and other Environmental Statutes and State Requirements*, Pages 7 – 9. OSWER Dir. 9234.1-02, August 1989. Likewise, if state regulations require a different approach or use a different design standard, the results need to be predictable and measurable. *Ibid.*, page 10.

Oregon’s hot spot regulations only require treatment of hot spots, “if feasible.” The discretion or professional judgment accorded to a decision maker within the Oregon regulations to avoid hot spot treatment or removal includes a cost-benefit analysis not found in federal law. Even though the Oregon regulations apply an undefined “higher threshold” for evaluating costs for treating hot spots, given the amount of discretion the Oregon regulations provide, there is no predictable and measurable result required under Oregon’s law. Therefore, Oregon’s hot spot regulations are not necessarily more stringent than CERCLA’s required analysis regarding treatment of principal threats at a site “to the maximum extent practicable” described in 42 USC 9621(b) and 40 CFR 430(a)(1)(iii)(a) and related guidance.

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